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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-679

CHARLES L. WOLFF, JR., *et al.*,
Petitioner

v.

ROBERT O. McDONNELL, *et al.*,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENT

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STATEMENT AND INTRODUCTION

The Court allowed the respondent an additional ten days to file a Supplemental Brief concerning points raised in the Brief for the United States as *Amicus Curiae* at the oral argument of this cause on April 22, 1974.

I.

PRISON DISCIPLINARY PROCEEDINGS ANCHORED TO APPROPRIATE PROCEDURAL DUE PROCESS PROTECTIONS DO NOT IMPEDE LEGITIMATE SOCIETAL OR PRISON ADMINISTRATION INTERESTS.

As counsel for the respondent pointed out in oral argument, certain *amicii* who filed briefs in support of the respondent in this cause have focused precisely on the issue raised by the Solicitor General in the United States' brief that recognizing constitutional protections for prisoners within the context of prison society is not sound penology. In fact, certain of the *amicii* were delegated specific responsibility for briefing these concerns and issues which attach to this type of case and, therefore, referral to the *amicii* briefs allows the respondent to answer certain arguments advanced by the Solicitor General, but not known by the respondent at the time of the filing of his brief.

As stated in the oral argument, the brief of the National Council on Crime and Delinquency as *Amicus Curiae* rebutts sharply and clearly the position advanced by the Solicitor General that procedural due process guarantees of the *Morrissey-Scarpelli* nature are in any fashion antithetical with and to sound correctional practice. It is now recognized that minimum procedural protections designed to result in reliable findings of fact and appropriate impositions of sanctions, do *not* result in inflexible and rigid practices, incapable of working in a rehabilitory fashion upon inmates, or impossible of improvement by penal authorities. Rather such protections allow the State (and Federal prison systems) the opportunity for creative, if somewhat more burdensome, penology within the framework of the consti-

tutional structure devised by the Founders of this Nation for the resolution of controversies in which one party is faced with the possibility of substantial penalty or "grievous loss." *Gagnon v. Scarpelli*, 411 U.S. 778, 783 & n. 5 (1973); *McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 250 (1971); *Clutchette et al. v. Procunier et al.*, No. 71-2357, April 25, 1974 (9th Cir.)[1]

The reduction of the "sense of injustice" felt by prisoners at disciplinary hearings (whether the underlying factual situation giving rise to a "write up" is or is not contested), the enhancement of a prisoner's self-esteem by affording him fair treatment, which is seen to be fair by the prisoner as well as the prison community, and the opportunity for appropriate sanctions against the prison offender as a result of the openness of the process from which facts are reliably ascertained when minimal due process protections of the *Morrissey-Gagnon* genre are required, all and singularly, are appropriate *because of the multiple and unique institutional setting of prison discipline.*[2]

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[1]Copies of this case are being filed with the Court and served on the State of Nebraska and the Solicitor General contemporaneously with the filing of this brief.

[2]The Solicitor General has raised in the United States' brief the specter of the "inmates' code" as presenting an insurmountable obstacle to open and fair prison hearings. As was pointed out at oral argument the identity of any informant is almost certainly known, but more importantly, the *Morrissey-Scarpelli* procedures take into account the fact that in certain instances secrecy of identity well be needed. Furthermore, there has been devised by lower courts creative solutions to this practical difficulty. *See, Palmigiano v. Baxter*, 487 F.2d 1280, 1290 (1st Cir. 1973); *Birzon v. King*, 469 F.2d 1241 (2d Cir. 1972), *in camera* examination of adverse witnesses by prison disciplinary board when identity of adverse witnesses is

Therefore, the main thrust of the Solicitor General's argument that constitutional protections are not appropriate to the prison setting, and in fact are detrimental to the prison setting, simply does not stand the test of close and careful analysis.

II.

APPLICATION OF RELIEF IN THIS CASE

The Solicitor General contends in the United States' brief that giving full application to any holding of this Court which requires new or more refined constitutional procedural due process protection for prisoners and prison disciplinary proceedings is not appropriate. He argues that past prison disciplinary action should not be invalidated for failure to comply with any new procedural requirements that may be announced by this Court in this case.

In responding to this point it is very important that the Court be aware of the nature of this lawsuit, which is a class action, and which involves more litigants than just the inmate class representative, Robert O. McDonnell. The trial court discussed the nature of this action at several points.[3]

It is appropriate to initially note that the Amended Complaint alleges that all pre-requisites exist for this class action under the provisions of Rule 23, Federal

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legitimately withheld from accused inmate. *See also, Morris v. Travisono,* 310 F. Supp. 857, 873 (D.R.I. 1970), the respondent is informed that all of the original provisions, including the informant rule, for prison hearings were included in the final consent decree entered April 22, 1972.

[3] *See,* R. Vol. II., at 2-3; at 15, 1. 17-p. 16, 1.2; at 109, 1.17-p. 111, 1.22; at 142, 1.7-19, and 1.25-p. 143, 1.8.

Rules of Civil Procedure for the United States District Courts. (*See* R. Vol. I, Filing 21, Amended Complaint, Paragraph 3 at -2-.)

The trial court in its Pre-Trial Order held: "3. The Court finds that a proper class action has been alleged and the case will proceed as such." This Order is referred to in the Relevant Docket Entries at A.2. *See also*, the opinion of the trial court at 342 F. Supp. 616,617 which reads: "The plaintiff, who is incarcerated at that institution, has been allowed to prosecute the case as a class action on behalf of all inmates of the Complex."

It would seem that there is little doubt that the class representative, as well as the other parties who testified in this case as party litigants, have standing to complain of the practices described in the Amended Complaint and documented in the exhibits introduced at the trial. Therefore, it also follows that the relief fashioned by the Court of Appeals in ordering expungement from prisoner's records determinations of misconduct arrived at in unreliable prison disciplinary proceedings was also proper. The Solicitor General touches on this point in the United States' brief where it is stated:

> [I]t is not clear whether it [the Court of Appeals] meant its holding to encompass a general principle of retroactivity or to apply only to the litigants in this case (either the individual or the entire class of prisoners at the Nebraska Complex). Our concern is with the possibility that the holding is to be construed to apply a broad retroactivity principle, and we address ourselves solely to the issue of general retroactivity and not to any question regarding the scope of relief appropriate for these litigants, including the propriety of expungement as a remedy. Brief of the United States as *Amicus Curiae* at 40-41 & n. 24.

Therefore, while the plaintiff argues that giving the full application of the Court of Appeals' mandate on expungement can not properly be construed as an application of a broad retroactivity principle, yet the plaintiff appreciates the point raised by the Solicitor General that the question of the scope of relief appropriate for these litigants, including the propriety of expungement as a remedy, is not questioned by the Solicitor General. The plaintiff certainly believes that regardless of the application of the relief fashioned by this Court for the prisoners who have been the object of constitutionally infirm prison disciplinary proceedings, the parties-litigant in this case, who have brought their factual situations before the trial court at the risk of having other actions involving the same factual situations dismissed,[4] are entitled to the full relief fashioned by the Court of Appeals and whatever relief this Court should fashion on the procedural due process issue.

Therefore, the appropriateness of the remedy of the Court of Appeals of the expungement of prison records arrived at in prison disciplinary proceedings which do not comport with minimum procedural due process protection, one as a general principal, but most certainly as appropriate relief for the parties-litigant in this action, is clear and should be affirmed.

III.

PROCEDURAL NOTE

While it is not raised in the Brief of the Solicitor General there was some discussion at oral argument concerning whether or not the mandate of the Court of

[4] *See*, note 2, *supra*.

Appeals issued, requiring the Nebraska Complex to comply with its dictates, or was stayed pending final order of this Court. On September 21, 1973 the United States Court of Appeals for the Eighth Circuit entered an order for the stay of mandate entered in the consolidated cases before it, one of which is now before this Court on review, for a period of thirty days from and after the date of the order. If within that period the Clerk of the Eighth Circuit received a certificate from the Clerk of the Supreme Court of the United States that a Petition for a Writ of Certiorari and record had been filed in the Supreme Court, the stay thereby granted was continued "until the final disposition of the cases by the Supreme Court."

The Petitioners have timely filed their Petition for Writ of Certiorari and record with this Court, the Court of Appeals for the Eighth Circuit has not issued its mandate in the consolidated cases and will not do so until final disposition of the cases by the Supreme Court. *See,* Rules 41(b) and 25(c) Federal Rules of Appellate Procedure.

CONCLUSION

For the foregoing supplemental reasons it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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May 2, 1974